

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

**COMMENTS OF CHANNEL TWENTY
TELEVISION COMPANY, LLC**

Channel Twenty Television Company, LLC ("CTTC"), by counsel, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 97-397, released November 26, 1997 ("*NPRM*") in the captioned proceeding.¹

* * *

These Comments urge the FCC to confirm the legal effect of a Commission-approved settlement agreement, where a party to that agreement -- *after* the FCC has issued an Order approving the settlement -- purports to withdraw from the agreement in order to force either a more lucrative settlement or a Treasury auction for the

¹ 62 Fed. Reg. 65392 (Dec. 12, 1997).

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channel. The Commission should clarify that, in such circumstances, no Treasury auction for the license is permissible.

A case that illustrates the need for this clarification involves the applications for a new television station on Channel 20 at Salt Lake City, Utah. Last year, the FCC approved a universal settlement of the proceeding, granted the application of CTTC, and dismissed the three other applications, including that of Garry A. Spire d/b/a Hokeiko Broadcasting Company ("Hokeiko"). After the Order taking these steps had issued, Hokeiko announced its intention to "withdraw" from the settlement. It later filed a petition for reconsideration of the dismissal of its application, apparently having decided, after the FCC had acted, that it would rather have participated in an auction for the Channel 20 permit.

FCC should not tolerate such a strategy, for several reasons. First, and most determinative, the Channel 20 proceeding is no longer within the scope of the auctions statute. The new law applies only to mutually exclusive applications that have been "accepted for filing." NPRM at ¶ 1 (FCC "must use auctions to resolve *mutually exclusive* applications for initial licenses for broadcast stations.") (emphasis added). The Hokeiko application had never been accepted for filing. Moreover, in the Channel 20 case, there are no longer any applications pending -- mutually exclusive or otherwise. CTTC's application was granted, and the applications of the remaining three parties, including Hokeiko, were dismissed. Because the proceeding is outside the scope of

Section 309(j), it would be unlawful for the FCC to hold an auction for the Channel 20 facility.

It is of no legal significance whatsoever that Hokeiko filed a petition for reconsideration of the dismissal of its application. As things stand, the FCC's Order concluded the proceeding, and no applications remain pending. The dismissal of the applicants other than Hokeiko has become final, as neither of those parties sought reconsideration of the Order. Hokeiko's lodging a reconsideration petition obviously does *not undo* the Order.

Nor are there any due process considerations warranting a different conclusion. Under *Mathews v. Eldridge*, the validity of a rule precluding an auction in a case such as the Channel 20 matter turns on (1) the nature of any private interest at stake and the risk of an erroneous deprivation of that interest through the procedure used; and (2) the nature of the Government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Here, of course, the threshold question is whether Hokeiko, at this juncture, has *any* cognizable interest that requires special protection. It does not. Hokeiko has no application pending. It demonstrated no error in the action of the Commission granting the CTTC application (beyond advancing the offensive suggestion that the Order was backdated, and making the frivolous argument that CTTC's efforts to enforce the settlement agreement in local court somehow amounted to an abuse of the FCC's processes). Hokeiko's pending reconsideration petition cannot, as if by alchemy, invest Hokeiko with some sort of constitutionally-protected interest predicated on its expectation of the ability to participate in an auction.

Moreover, permitting a party such as Hokeiko to scuttle a settlement the FCC has already approved would be, not only legally insupportable, but terrible public policy. Congress encouraged the FCC to facilitate settlements, even to the extent of waiving certain rules that would preclude them in other circumstances. All parties to the Channel 20 settlement entered it voluntarily. The FCC devoted considerable resources to reviewing the proposal and concluding that its approval would serve the public interest. To allow Hokeiko to play the "spoiler" in these circumstances would be ludicrous.

Of course, there is always the *theoretical* possibility that Hokeiko could successfully appeal the dismissal of its application. But this does not in any way create a protectable interest where none now exists. The Commission's approval of the settlement and the dismissal of Hokeiko's application are already subject to the outcome of a subsequent appeal. *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 735-36 (D.C. Cir. 1976) (grant of licenses are subject to judicial review and obligation of FCC to give effect to court's judgment).

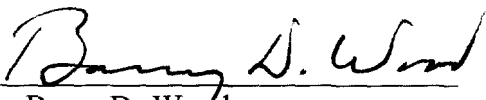
Finally, there is the need for the Commission to promote the rapid institution of new service. It would hardly encourage CTTC to move forward with the construction of its new station if the Commission were to subject the frequency for which CTTC has already distributed hundreds of thousands of dollars in settlement payments to an auction. Nor would it be fair for this channel to be snatched from CTTC and placed on the auction block.

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For these reasons, the Commission should clarify that cases in which global settlements were approved, and construction permits issued, prior to the effective date of the auction rules are not subject to auctions.

Respectfully submitted,

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